

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
SUSAN EVELYN KYNOR	:	DETERMINATION
	:	DTA NO. 816085
for Redetermination of a Deficiency or for Refund of	:	
Personal Income Tax under Article 22 of the Tax Law	:	
for the Year 1992.	:	

Petitioner, Susan Evelyn Kynor, 111 North 17th Street, East Orange, New Jersey 07017-5214, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1992.

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on June 17, 1998 at 10:30 A.M., with all briefs to be submitted by September 9, 1998, which date began the six-month period for the issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Laura J. Witkowski, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly denied petitioner's refund claim pursuant to Tax Law § 687(a).

II. Whether petitioner's refund claim should be granted under the special refund authority of Tax Law § 697(d).

III. Whether Tax Law § 687(a) as applied in this case unconstitutionally deprived petitioner of her rights to due process and equal protection of the laws.

FINDINGS OF FACT

1. Petitioner, Susan Evelyn Kynor, filed her 1992 New York State Nonresident and Part-Year Resident Return (Form IT-203) on August 15, 1996.

2. Petitioner's 1992 return claimed an overpayment of \$1,241.32. This overpayment resulted from the difference between the amount of withholding taxes collected by petitioner's employer and petitioner's total 1992 New York State and City of New York income tax liability. Specifically, petitioner's employer withheld \$4,229.92 in income taxes and petitioner's total income tax liability was \$3,088.60.¹ Although petitioner did not claim a refund of this overpayment on her return,² the Division of Taxation ("Division") treated petitioner's return as a claim for refund.

3. Petitioner did not file a copy of a signed New York State Form IT-370 (Application for Automatic Extension of Time to File for Individuals) with her 1992 return. Petitioner also did not file a signed Federal Form 4868 (Application for Automatic Extension of Time to File U.S. Individual Income Tax Return) with her 1992 New York return.

4. Pursuant to a letter dated September 25, 1996 and a Notice of Disallowance dated October 11, 1996, the Division denied petitioner's refund claim as being filed late. As indicated on both the letter dated September 25, 1996 and the Notice of Disallowance, the reason for the denial was that petitioner's refund claim for 1992 (i.e., the 1992 return) had been filed more than three years from the date the 1992 return was due and was therefore beyond the period of limitations for such a claim.

¹Petitioner made a mathematical error in calculating her overpayment. Based on the amounts reported on the return, petitioner's overpayment for 1992 was \$1,141.32.

²Petitioner left line 75 of her 1992 IT-203 ("Amount of [overpayment] to be refunded to you") blank.

5. Late-filed returns, such as petitioner's 1992 New York nonresident return, are processed by the Delinquent and Amended Returns Processing Unit of the Division's Processing Bureau. Late-filed returns that meet certain guidelines set internally by the Processing Bureau may be assessed or refunded by the Processing Bureau. Late-filed returns that do not meet the Processing Bureau's internal guidelines for assessment or refund are sent to the Division's Audit Division to be reviewed by a Senior Audit Clerk under the direction of an Income Tax Technician II.

6. Upon receiving a late-filed return from the Processing Bureau, the standard procedure to be followed by the Senior Audit Clerk includes a review of all available information in the Division's computer system related to the filing of an extension application. If the year in question has been deleted from viewing access on the computer system, a request for a microfiche search is sent to the Division's Central Files Master Index section. The results of such a search are sent to the Audit Division.

7. Petitioner's 1992 nonresident return did not meet the Processing Bureau's internal guidelines for the granting of a refund. Accordingly, the return was forwarded to the Audit Division and was assigned to a Senior Audit Clerk for review.

8. The Senior Audit Clerk assigned to review petitioner's 1992 return followed the standard procedures described above and concluded that, prior to the receipt of petitioner's 1992 nonresident return, the Division did not receive either a signed Form IT-370 or a signed Federal Form 4868 from petitioner.

9. On or about May 12, 1998, following the filing of the petition herein, the Audit Division conducted a follow-up search of the Division's records for any evidence that petitioner had filed either a signed Form IT-370 or a Form 4868. This search failed to turn up any record of

an extension request filed by petitioner for the tax year 1992. This search did reveal that petitioner had filed a valid extension request for both the 1991 and 1993 tax years.

10. Petitioner filed a Form 4868 for the tax year 1992 with the Internal Revenue Service in 1993.

11. Petitioner did not offer into evidence herein a copy of any New York State extension application for the 1992 tax year.

12. Petitioner did not offer into evidence herein any documentary evidence of mailing (e.g., a return receipt) to prove that either a Form IT-370 or a Form 4868 was mailed to New York State to request an extension with respect to petitioner's 1992 New York nonresident return.

13. The Division submitted proposed findings of fact numbered "1" through "13". These proposed findings of fact are accepted and have been substantively incorporated herein.

SUMMARY OF PETITIONER'S POSITION

14. a) Petitioner contended that she timely filed with the Division an application for an automatic extension for 1992. b) Alternatively, petitioner asserted that even if she failed to file an extension application, her refund claim should be granted pursuant to the special refund authority of Tax Law § 697(d). c) Petitioner also contended that Tax Law § 687(a) as applied in this case unconstitutionally deprived petitioner of her property without due process. d) Petitioner also contended that the application of Tax Law § 687(a) herein denied petitioner her right to equal protection because she was not afforded the same rights as a person claiming abandoned property. e) Petitioner further noted that she was granted a Federal extension for the year in question and contended that New York cannot enforce its rules regarding extensions because the New York return is based on the Federal return and therefore, according to petitioner, New York's enforcement of its rules is tantamount to negating petitioner's Federal extension.

Petitioner also asserted that her home state of New Jersey does not require a separate request for an extension in a refund situation where the taxpayer files a Federal extension.

CONCLUSIONS OF LAW

A. Generally, a claim for credit or refund of an overpayment of personal income tax must be filed within three years from the time the return was filed or two years from the time the tax was paid, whichever is later (Tax Law § 687[a]). The three-year period is applicable in this case. If the claim is filed within the three-year period, the amount of refund allowable may not exceed the portion of tax paid within the three-year period immediately preceding the filing of the refund claim plus the period of any extension of time for filing the return (*id*). Accordingly, in order to determine the amount of refund allowable to petitioner, the factual question of whether petitioner timely filed an application with the Division for an automatic extension on either Form IT-370 or Federal Form 4868 must be resolved.³

The record in this matter does not support petitioner's contention that she filed an extension application with the Division in connection with her 1992 New York return. Petitioner did not produce a copy of any such extension application. Petitioner also did not produce any documentary proof of mailing of any such application (e.g., a return receipt). Furthermore, the Division introduced evidence establishing that it had searched its records and had found no evidence that petitioner had filed an extension application for the 1992 tax year. Such evidence

³By way of background, personal income tax returns for a given year are due by April 15 of the following year (Tax Law § 651[a]). The Tax Law provides for a reasonable extension of time for the filing of such returns (Tax Law § 657[a]). The requirements for such an extension are contained in the Division's regulations. As relevant herein, an individual, such as petitioner, who anticipates having no amount of New York State, City of New York or City of Yonkers tax remaining unpaid as of April 15 may receive an automatic four-month extension of time provided that, on or before April 15, such individual files with the Division either a properly completed Form IT-370 (Application for Automatic Extension of Time to File for Individuals) or a copy of a properly completed Federal Form 4868 (Application for Automatic Extension of Time to File U.S. Individual Income Tax Return) (*see*, 20 NYCRR 157.2[b][1]).

outweighs petitioner's testimony that she did file an extension application for 1992. Moreover, the fact that petitioner filed extension applications with the Division for 1991 and 1993 and filed an extension application with the Internal Revenue Service for 1992 provides little support to petitioner's contention that she filed an extension with the Division for 1992 given the lack of evidence of such a filing. It is concluded, therefore, that petitioner did not file an application with the Division for an automatic extension for the year 1992.

Since petitioner did not file an extension application for 1992, the amount of refund allowable is limited to the portion of tax paid during the three years immediately preceding the filing of her refund claim on August 15, 1996 (*see*, Tax Law § 687[a]). Petitioner's overpayment of tax and refund claim for 1992 resulted from the difference between total withholding taxes collected by petitioner's employer and petitioner's total 1992 New York State and City of New York income tax liability (*see*, Finding of Fact "2"). All such withholding tax is deemed to have been paid by petitioner on April 15, 1993 (*see*, Tax Law § 687[i]). Accordingly, no portion of the overpayment of tax claimed as a refund was paid during the three-year period immediately preceding the filing of the refund claim. The Division therefore properly denied petitioner's refund claim pursuant to Tax Law § 687(a).⁴

B. Tax Law § 697(d) grants to the Commissioner of Taxation and Finance a special refund authority under certain conditions when the statute of limitations has expired with respect to a refund. This section sets forth these conditions as follows:

⁴Although the Division correctly denied petitioner's refund claim pursuant to Tax Law § 687(a), such refund claim was not, strictly speaking, "late-filed" as the Division asserted in correspondence dated September 25, 1996 and in the Notice of Disallowance (*see*, Finding of Fact "4"). Rather, as discussed above, the amount of refund allowable was reduced to zero because no portion of the overpayment had been paid within three years of the filing of the refund claim. It is noted that the Division correctly explained the basis of its denial of petitioner's refund claim in its answer.

Where no questions of fact or law are involved and it appears from the records of the tax commission that any moneys have been erroneously or illegally collected from any taxpayer or other person, or paid by such taxpayer or other person under a mistake of facts, pursuant to the provisions of this article, the tax commission at any time, without regard to any period of limitations, shall have the power, upon making a record of its reasons therefor in writing, to cause such moneys so paid and being erroneously and illegally held to be refunded and to issue therefor its certificate to the comptroller. (Tax Law § 697[d].)

Petitioner has failed to show that the conditions under which the special refund authority may be invoked are present in this case. Specifically, there is no evidence in the record that the amount in question was erroneously or illegally collected from petitioner or was paid under a mistake of fact.⁵ As previously noted, petitioner's overpayment of tax for 1992 resulted from the difference between the amount of withholding taxes collected by petitioner's employer and petitioner's total 1992 New York State and City of New York income tax liability.

Overwithholding by itself does not constitute an erroneous or illegal payment or a payment under a mistake of fact for purposes of Tax Law § 697(d) (*see, Matter of Filler*, Tax Appeals Tribunal, August 24, 1989). Accordingly, in the absence of any evidence of error, illegality or mistake, petitioner's refund claim may not be granted under the special refund authority of Tax Law § 697(d).

C. Petitioner's contention that Tax Law § 687(a) as applied in this case deprived her of her right to due process is rejected. Tax Law § 687(a) clearly provides sufficient procedural protections to satisfy constitutional due process requirements (*see, Matter of Banco*, Tax Appeals Tribunal, April 17, 1997; *see also, McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 US 18, 110 L Ed 2d 17).

⁵Indeed, as the Division correctly notes in its brief, petitioner did not even allege that the amount in question was collected from her illegally or erroneously or paid under a mistake of fact.

D. Petitioner's claim that Tax Law § 687(a) as applied in this case deprived her of her right to equal protection is also rejected. Absent a showing of uneven treatment there can be no equal protection violation (*see, Trump v. Chu*, 65 NY2d 20, 25, 489 NYS2d 455, 459). There is no evidence in the record that petitioner was treated differently with respect to section 687(a) than any other taxpayer. Contrary to petitioner's assertion (*see*, paragraph "14[d]"), the fact that the state may (or may not) treat abandoned property claims differently than claims for refund of income tax does not show uneven treatment in the application of Tax Law § 687(a).

E. Petitioner's contentions set forth in paragraph "14(e)" are also without merit. Whether petitioner filed a Federal extension request for 1992 or whether New Jersey requires such a request has no bearing on her failure to file a New York extension application. Additionally, New York's requirement that such an application be filed in no way "negates" petitioner's Federal extension.

F. The petition of Susan Evelyn Kynor is denied and the Division's denial of petitioner's refund claim is sustained.

DATED: Troy, New York
February 11, 1999

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE